United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

Court

74-1767

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal No. 74-1767

SHATTUCK ET AL.,

Appellees,

v.

HOEGL ET AL.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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Robert J Kadek, attorney for Shattuck et al
July 30, 1975 RJK

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IN THE

United States Court of Appeals

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Appeal No. 74-1767

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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APPELLANTS' PETITION FOR REHEARING *EN BANC*

Appellants petition under Rules 35 and 40 of the Federal Rules of Appellate Procedure for a rehearing by this Court, sitting *en banc,* on the question of appealability of the order entered by the Court below under 35 U. S. C. § 24. An *en banc* rehearing is requested for the following reasons:

1. This Court's decision of July 16, 1975, holding discovery orders under 35 U. S. C. § 24 non-appealable, is contrary to its previous decisions permitting appeal from such orders. Accordingly, a ruling on this issue by the

full Court is necessary in order to obtain uniformity in the Court's decisions.

2. The July 16, 1975 decision by a panel of this Court, without participation by the entire Court, to foreclose an appeal in this case from a discovery order under 35 U. S. C. § 24, is prejudicial to appellants and denies equal opportunity for discovery between parties to an interference proceeding and review of discovery orders.

3. The *Tucker* case, upon which the Court based its decision, is inapplicable here.

A. The Decisions of this Court as to Appealability of Discovery Orders Under 35 U. S. C. § 24 Have Not Been Uniform

In *Babcock and Wilcox* v. *Combustion Engineering, Inc.* (oral decision November 21, 1968), which was cited (pp. 6 and 8) in the majority opinion here, this Court (Kaufman, C. J., Anderson, C. J., and Tenney, D. J.) heard a motion to dismiss an appeal from a discovery order under 35 U. S. C. § 24, based upon lack of appellate jurisdiction under 28 U. S. C. § 1291.

Contrary to the statements in the majority opinion (page 8, lines 13-16 and in footnote 8), the issue of appellate jurisdiction was specifically raised and argued in the *Babcock* case. After briefing and oral argument the motion to dismiss was denied, and the case was decided on the merits of the appeal. A copy of the motion to dismiss in that case is appended hereto as Exhibit A and copies of the brief opposing the motion and an affidavit by Arthur S. Tenser Esq., who argued against that motion, are appended hereto as Exhibits B and C, respectively.

Furthermore, in the present appeal another panel of this Court has already ruled that the District Court's Order is appealable. On August 13, 1974, after full briefing and

oral argument, the Court (Oakes, C. J., and Frankel and Kelleher, D. J. J.) denied appellees' motion to dismiss this appeal for alleged lack of jurisdiction under 28 U. S. C. § 1291.

In view of the obvious divergence of views on the issue among the members of the Court, consideration by the full Court is now necessary to assure uniformity of the Court's decisions on the question of appealability of discovery orders under 35 U. S. C. § 24.

B. The Court's Ruling Is Prejudicial And Denies Equal Opportunity For Discovery And Review In This Circuit

1. Opportunity For Review Is Not Equal

As a result of this Court's decision, an interference party seeking discovery in this Circuit enjoys two opportunities prior to a final hearing on priority to obtain the desired discovery. It may bring a motion in the Patent and Trademark Office for discovery under 37 C. F. R. § 1.287. If the motion is denied, it may still bring a proceeding in the district court under 35 U. S. C. § 24 seeking the same discovery, as was done in this case. That second opportunity constitutes an immediate review of the previous decision. In the present case, appellees have been permitted a unique windfall opportunity to obtain an immediate *de-facto* reversal of a prior adverse discovery ruling.

On the other hand, appellants, against whom discovery is sought, may not obtain any review of a discovery decision adverse to them. Instead, the majority opinion states (p. 13) that appellants' objections to the scope of discovery granted and to vitiation of their privileges are not of sufficient importance to warrant review. Appellants are left with an empty opportunity to challenge admissibility of their privileged information in the Patent and Trademark

Office and to appeal after final adjudication of the interference by the Patent and Trademark Office.

In determining admissibility of evidence in the interference, however, the Patent and Trademark Office will not consider appellants' contention that Rule 34 discovery as a whole is improper under 35 U. S. C. § 24 and will not rule upon appellants' claim of privilege since admissibility does not depend upon either of those contentions.

The propriety of the District Court's order is a controlling question of law concerning the scope of a federal statute. The Patent and Trademark Office can give no relief concerning it, and appellants will have no review there of its contention.

Likewise, the Patent and Trademark Office can not pass upon appellants' claim of privilege since the privilege will have been destroyed as a result of the disclosure ordered by the Court. Consequently, the assumption at pages 10 and 12 of the majority opinion that the appellants will have a later opportunity for review of the issue presented by this appeal is erroneous. The appellants' rights would be destroyed completely by compliance with the District Court order and could not be restored by any subsequent review.

The situation here is not the same as in *American Express Warehousing, Ltd.* v. *Transamerican Insurance Company,* 380 F. 2d 277 (2nd Cir. 1967) cited by this Court. There, the District Court ordered discovery of materials which were subject only to a claim of work product protection. There was no claim of attorney client privilege and the court noted that no rights would be destroyed, stating (at 281):

> "Unlike the case of a trade secret, erroneous disclosure of work product does not make almost certain the immediate destruction of a protected property right, cf. Covey Oil Co. v. Continental Oil Co., 340

> F. 2d 993 (10th Cir.), cert. denied 380 U. S. 964, 85 S. Ct. 1110, 14 L. Ed. 2d 155 (1965) (appellants not parties to litigation). The interest protected is not only qualified but intangible and difficult to relate to immediate harm." [Footnote omitted]

Attorney client communications, on the other hand, are subject to an absolute privilege which protects an unqualified and tangible right. This Court should not sanction erroneous and irrevocable destruction of that right.

In *American Express, supra,* moreover, the appeal was from an order by the court having jurisdiction over the primary proceeding and was not reviewable by and could not be countermanded by any ancillary authority.

2. Opportunity For Discovery Is Not Equal

In light of recent rulings by other appellate courts concerning the scope of discovery permitted under 35 U. S. C. § 24, the present decision of this Court would subject interference parties to procedural inequalities. Parties seeking discovery previously denied by the Patent and Trademark Office would be successful in this Circuit but unsuccessful in other circuits. *Frilette et al* v. *Kimberlin et al; Duffy* v. *Barnes et al,* 508 F. 2d 205, 184 U. S. P. Q. 266 (3rd Cir. 1974) cert. den. ____ U. S. ____, 185 U. S. P. Q. 705; *Sheehan* v. *Doyle et al,* 513 F. 2d 895, 185 U. S. P. Q. 489 (1st Cir. 1975).

The procedural inequities which result are not insubstantial. A party failing to obtain the prior authorization from the Patent and Trademark Office required by other circuits will, upon review of the entire proceeding, carry the burden of rebutting a presumption in favor of that which has been decided, should it continue to seek .the same discovery. *Ochsner et al* v. *Millis,* 382 F. 2d 618 (6th Cir. 1967); *Speed Products Co.* v. *Tinnerman Products, Inc.,* 179 F. 2d 778 (2d Cir. 1949). Although the

majority opinion states that great weight need not be granted to a prior determination of the Patent and Trademark Office where it "had ignored an issue or evidence on an issue" (page 10, lines 6 and 7), the burden of proof required to rebut the presumption is not considered.

It is well-established that to overturn a previous decision of the Patent and Trademark Office, a plaintiff in a subsequent civil action must *thoroughly convince* the reviewing court of the alleged error. *Morgan* v. *Daniels,* 153 U. S. 120 (1893). This is a higher burden of proof than is required under the more common standard of preponderance of the evidence. *Minnesota Mining and Manufacturing Co. et al.* v. *Carborundum Co.,* 155 F. 2d 746 (3rd Cir. 1946). It results from a recognition that the Patent and Trademark Office is an "expert body pre-eminently qualified to determine questions of this kind." *Esso Standard Oil Co.* v. *Sun Oil Co., et al.,* 229 F. 2d 37 at page 40 (U. S. App. D. C. 1956).

Accordingly, a party denied discovery by the Patent and Trademark Office and, therefore, having no opportunity to obtain the same discovery under 35 U. S. C. § 24, will carry a heavier burden in the courts upon review of the entire proceeding than will appellees here. The present decision of this Court, therefore, makes it possible to obtain broad Rule 34 discovery in this Circuit while other circuits preclude such discovery. *Frilette* v. *Kimberlin; Sheehan* v. *Doyle, supra.* Since the parties to an interference do not ordinarily have a choice of forum, these procedural inequalities arising out of differences of opinion between the circuit courts are quite serious. If such inequalities are to be perpetuated by this Circuit, the decision to do so ought to be expressed by the full Court.

C. The Tucker Case Is Inapplicable

This Court has relied heavily on *Tucker et al.* v. *Peiler et al.*, 297 F. 570 (2d Cir. 1924) as authority for denying an appeal from a discovery order under 35 U. S. C. § 24.

The situation in *Tucker* was entirely different from the situation presented in this appeal. In that case a witness, who was not subject to the jurisdiction of the court because no subpoena had issued, refused to produce documents or answer questions on cross-examination. As a result, the party seeking discovery petitioned the District Court for a writ of subpoena to obtain documents and testimony concerning them. The petition was denied by the District Court without prejudice to a subsequent application for a subpoena *duces tecum*. Denial of the petition was held not reviewable on appeal because there was no proceeding pending in the court at that time in connection with the witness and the District Court could still act in the matter.

In the present situation, a subpoena had been served on the witness Weigl at the time he refused to produce privileged documents or testify about them. The order involved in this appeal compelled the production of those documents and testimony concerning them, thereby granting to appellees the relief requested and completely ending the matter in the District Court.

The present case is far more closely related to *Baush Machine Tool Company* v. *Aluminum Company of America*, 63 F. 2d 778 (2d Cir. 1933), which this Court did not consider in its opinion here. In *Baush*, this Court ruled that a decree directing a party to answer interrogatories in an antitrust action pending in the same court was appealable. The *Tucker* case was discussed and was limited to its facts, the Court stating (63 F. 2d at p. 779):

> "Tucker v. Peiler 297 F. 570 (CC82), involved a proceeding to obtain evidence by subpoena, and

there we pointed out that orders issued denying or granting subpoena duces tecum are not final and, therefore, not appealable. But in the instant case, there is a decree which is final. United States v. River Rouge Improvement Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339; Munger v. Firestone Tire and Rubber Co., supra. The decree completely ends the equity suit. It gives to the appellee the relief asked. The decree must be executed by the appellant, and if error has been committed in granting it, the appellant is entitled to have it reviewed as it seeks here."

Accordingly, this Court has limited the applicability of the *Tucker* case to a situation in which the lower court order precedes the issuance of a subpoena by that court. In the present situation, the order issued by the District Court below *ended* a proceeding which had been initiated by a subpoena. There remained nothing for the witness to do but obey the order. Accordingly, an appeal lies under the authority of the *Baush* case.

D. Conclusions

1. An *en banc* rehearing is required to ensure a uniformity of decisions of this Court concerning appealability of discovery orders under 35 U. S. C. § 24;

2. An *en banc* rehearing is necessary to enable the full Court to rule upon whether parties seeking discovery in this Circuit under 35 U. S. C. § 24 should continue to enjoy windfall procedural benefits;

3. An *en banc* rehearing is necessary to enable the full Court to reconsider the applicability of *Tucker et al.* v.

Peiler et al. in light of this Court's more recent decision in *Baush Machine Tool Company* v. *Aluminum Company of America, supra* p. 7.

Respectfully submitted,

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July 30, 1975

ADDENDUM

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE BABCOCK & WILCOX COMPANY :
Assignee of the Interference Parties
Rothemund and Koch :

Movant-Appellee : Appeal No.

v.

:

COMBUSTION ENGINEERING, INC.,
Assignee of the Interference Parties :
Powell, Schroedter, Clayton and Knust,

:

Opposer-Appellant.

:

MOTION TO DISMISS THE APPEAL AND IN THE ALTERNATE, TO GRANT A PPEFERENCE WITH TYPEWRITTEN BRIEFS

1. The Babcock & Wilcox Company, appellee, ("B&W") hereby moves this Court for an Order dismissing the Appeal of Combustion Engineering, Inc. - appellant, ("C.E.") as being a non-final discovery Order under 28 USC 1291. This Motion is supported by the affidavit of Roland T. Bryan, attached hereto, along with its attachments, indicating the history of the proceedings in the court below, and the time urgency that is upon B&W to have an immediate resolution of this matter.

2. In the alternative, and in view of the urgency of the time schedule, B&W moves this court for an Order granting a preference for the hearing of this appeal which is addressed to the propriety of the Court's decision below when it granted B&W discovery in aid of the administrative proceedings before the United States Patent Office.

Leave is also requested, in the event that such

preference is granted, for the parties to be allowed to file typewritten briefs.

ROBERTSON, BRYAN, PARMELEE & JOHNSON

By: Roland T. Bryan

Roland T. Bryan
500 Summer Street
Stamford, Connecticut 06902
Attorneys for Movant-Appellee

OF COUNSEL:

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500 Summer Street
Stamford, Conn. 06902

Joseph M. Maguire, Esq.
161 E. 42nd Street
New York, New York

November 19, 1968

EXHIBIT B

Docket No.
30974

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE BABCOCK & WILCOX COMPANY Assignee of the Interference Parties Rothemund and Koch	:	
Appellee,	:	
v.	:	Appeal No.
COMBUSTION ENGINEERING, INC., Assignee of the Interference Parties Powell, Schroedter, Clayton and Knust	:	
Appellant.	:	

BRIEF OF COMBUSTION ENGINEERING, INC.
IN OPPOSITION TO THE MOTION BY THE
BABCOCK & WILCOX COMPANY TO DISMISS THE APPEAL

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v.	:	Appeal No.
COMBUSTION ENGINEERING, INC., Assignee of the Interference Parties Powell, Schroedter, Clayton and Knust Appellant.	:	

BRIEF OF COMBUSTION ENGINEERING, INC.
IN OPPOSITION TO THE MOTION BY THE
BABCOCK & WILCOX COMPANY TO DISMISS THE APPEAL

I. Background

On November 20, 1968, shortly before 4 p.m., counsel for Combustion Engineering, Inc. (C.E.), the above-named appellant, was served with papers constituting a Motion by The Babcock & Wilcox Company (B & W) to dismiss the appeal. In view of the urgency expressed ex parte by B & W, the matter was set for hearing at 10:30 a.m. on November 21, 1968.

The order of the District Court for the District of Connecticut, from which the appeal was taken, was not entered until November 18, 1968. On November 19,

1968, C.E. mailed its Notice of Appeal to the District Court. On that same day, November 19, 1968, counsel for B & W telephoned C.E.'s attorney advising him of B & W's intention to move for dismissal of the appeal or for a preference and to have the motion set for hearing at the earliest possible time.

The Motion is in an alternative form, asking for dismissal of the appeal or for a preference. C.E., having no desire to delay a decision on the issue of the appeal, does not oppose the granting of a preference in the calendar position for argument, sought by B & W, nor does it oppose the request for leave for the parties to file typewritten briefs.

II. The Motion to Dismiss in Premature Without Fair Notice to C.E. and at the Very Minimum C.E. is Entitled to Have it Carried Over for Determination with the Principal Issue

The record of the proceedings before the District Court not yet having been transmitted and the appeal as yet undocketed, the Motion to Dismiss is premature and should not be entertained by the Court, notwithstanding B & W's protestations that it will be prejudiced by giving fair notice to C.E.

Although C.E. believes the Order clearly to be final and appealable under 28 USC 1291 for the reasons noted hereinafter, C.E. at the very minimum, is entitled to have the Motion to Dismiss carried over by the Court for determination together with the principal issue on appeal. Similar motions were precisely so treated by the

Fifth Circuit Court of Appeals in Gladrow et al v. Weisz, 354 F.2d 464, 148 U.S.P.Q. 110 (CA 5, 1965), and in the Seventh Circuit, Natta et al v. Zletz et al, 379 F.2d 615, 153 U.S.P.Q. 768 (CA 7, 1967). Should the Motion for preference (which C.E. does not oppose) be granted, B & W would then obtain the quick consideration that it seeks.

Accordingly, as an alternative to denial of the Motion to Dismiss the appeal, counsel for C.E. respectfully request that the Court construe this paper to include a motion by C.E. to carry the matter over for determination with the principal issue.

III. The Particular Discovery Order Involved Here is Final and Appealable, and Other Circuits Have So Held

In his motion to dismiss, counsel for B & W contends that the discovery order handed down by the District Court is non-final, under 28 USC 1291, and therefore not appealable. However, he fails to cite any authorities that have held unappealable the kind of discovery order with which we are concerned.

The discovery proceedings here involved are ancillary to an administrative proceeding presently pending before the United States Patent Office. Under a provision of the patent statute, 35 USC 24, the power of the District Courts to compel the attendance of witnesses and the production of documents is made available to the contestants in such proceedings under certain circumstances. This matter is before the Court

by virtue only of that statutory provision and the only action pending between the parties is that before the Patent Office. Thus, insofar as the District Court is concerned, discovery questions are final since its decision and order completely dispose of the matter pending before it.

The Fifth Circuit in Gladrow v. Weisz, supra in a similar fact situation, specifically recognized the appealability of the issue. Denying a motion to dismiss the appeal on the ground that the order granting discovery pursuant to 35 USC 24 was interlocutory and not final (the position of B & W here) the court noted:

> "Without hesitation, we hold that the order requiring the appellants to produce the page or pages of the notebook was a substantial end to the proceedings in the district court, and, hence, that the order is final and appealable.",

citing Cobbledick v. United States, 1940, 309 U.S. 232; Ellis v. I.C.C., 1915, 237 U.S. 434; United States v. Vivian, 7 Cir. 1955, 217 F.2d 882.

The Tenth Circuit also has ruled that the type of discovery order involved here is appealable, Natta et al v. Hogan et al, 157 USPQ 183, 185 (CA 10, 1968), the court stating:

> "This places discovery proceedings in aid of action by an administrative agency in a different category from such proceedings in aid of a matter pending before a court. Here the proceedings before the district court have come to an end. The party affected should not be 'powerless to avert the mischief of the order'. In the circumstances presented a party should not be required to risk the

> hazard of punishment in order to obtain a determination of its rights. In our opinion the order in question is final and appealable." (emphasis supplied)

The right to appeal from an order (pursuant to 35 USC 24) denying discovery was recognized by the 7th Circuit in Natta et al v. Zletz et al, supra.

None of the Second Circuit cases cited in B &W's memorandum in alleged support of its sweeping contention that "The Second Circuit has had a long standing rule that no appeal lies from an order directing a party to testify or produce documents" are in point. These cases do not pertain to proceedings under 35 USC 24.

IV. Conclusions

C.E. does not oppose B & W's motion for a preference or its request for leave for the parties to file typewritten briefs.

B & W's Motion to Dismiss is premature and without fair notice to C.E. At the very minimum, C.E. is entitled to have the motion carried over for consideration with the principal issue on appeal.

The pertinent authorities have uniformly held that discovery orders granted pursuant to proceedings under 35 USC 24 are final and appealable pursuant to 28 USC 1291 and B & W has cited no cases in support of dismissal of the appeal.

Consequently, B & W's Motion to Dismiss should be denied.

Dated this 21st day of November, 1968.

BRUMBAUGH, GRAVES, DONOHUE & RAYMOND

By Arthur S. Tenser
Arthur S. Tenser
Attorneys for Combustion Engineering, Inc.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Combustion Engineering, Inc. in Opposition to the Motion by the Babcock & Wilcox Company to Dismiss the Appeal was hand delivered to Roland T. Bryan, Esq., Robertson Bryan, Parmelee & Johnson in the U.S. Courthouse, Foley Square, New York, N.Y., this 21st day of November, 1968.

Arthur S. Tenser
Arthur S. Tenser
BRUMBAUGH, GRAVES, DONOHUE & RAYMOND
90 Broad Street
New York, N.Y. 10004

EXHIBIT C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SHATTUCK ET AL.,	:	
Appellees,	:	
v.	:	Appeal No. 74-1767
HOEGL ET AL.,	:	
Appellants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ARTHUR S. TENSER, being duly sworn, deposes as follows:

1. I am an attorney admitted to practice before this Court and a member of the firm of Brumbaugh, Graves, Donohue & Raymond, 30 Rockefeller Plaza, New York, New York 10020.

2. I represented the party Combustion Engineering, Inc. in the appeal to this Court, designated The Babcock & Wilcox Co. v. Combustion Engineering, Inc., from an adverse discovery order entered by the United States District Court for the District of Connecticut under 35 U.S.C. § 24.

3. On November 21, 1968, I attended a hearing before Judges Kaufman, Anderson and Tenney (U.S.D.J.) on a motion by The Babcock & Wilcox Co. to dismiss the appeal of Combustion

Engineering, Inc. That motion was based upon alleged lack of appellate jurisdiction to hear the appeal under 28 U.S.C. § 1291

4. After argument in support of the motion by counsel for The Babcock & Wilcox Co., this Court, in an unreported ruling, denied the motion from the bench and scheduled a hearing on the merits of the appeal.

Arthur S. Tenser

Arthur S. Tenser

Sworn to and subscribed
before me this 25th day
of July, 1975.

Notary Public

JANE A. HORTON
Notary Public, State of New York
No. 31-1864150
Qualified in New York County
Commission Expires March 30, 19__

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RONALD B. HILDRETH
ALLAN H. BONNELL
GRANVILLE M. BRUMBAUGH, JR.
THOMAS R. NESBITT, JR.
ROBERT NEUNER
RICHARD G. BERKLEY

JOHN M. NEARY
RUSSELL H. FALCONER
WILLIAM E. PELTON
SANFORD J. ASMAN
MELVIN C. GARNER
RALPH W. SELITTO, JR.

July 30, 1975

BY HAND

Hon. A. Daniel Fusaro, Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, NY 10007

Re: Shattuck et al v. Hoegl et al
Appeal No. 74-1767

Dear Mr. Fusaro:

Enclosed herewith for filing on behalf of the appellants, Hoegl et al, in connection with the above appeal are twenty-five (25) copies of APPELLANTS' PETITION FOR REHEARING EN BANC.

Receipt of a copy for attorneys for Shattuck et al has been acknowledged on the top copy of these documents.

Respectfully,

Francis J. Hone

Enclosures

cc: Robert J. Kadel, Esq.
Joseph G. Walsh, Esq.